No. 92-606

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION

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December 9, 1992

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Respondents.

On Petition For A Writ Of
Certiorari To The United States Court Of Appeals
For the Fifth Circuit

THE ASSOCIATION OF AMERICAN RAILROADS' AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION

The Association of American Railroads ("AAR") and the Airline Industrial Relations Conference ("AIRCON") respectfully move this Court for leave to file the attached brief *amicus curiae* in the above-captioned matter:

1. AAR and AIRCON obtained the consent of the Petitioner to file a brief *amicus curiae*. AAR and AIRCON requested the consent of the Respondents Brotherhood of Maintenance of Way Employes ("BMWE"), Ben Ochoa, E.R.

Maintenance of Way Employes ("BMWE"), Ben Ochoa, E.R. Spears, Paul S. Swanson, and Bruce G. Glover, who are General Chairmen of the BMWE, to the filing of a brief *amicus curiae* in support of the Petitioner Burlington Northern Railroad Company ("BN"). The Respondents refused to give consent, stating that they did not believe an *amicus* brief was appropriate at this stage of the proceeding.

2. As stated in the Rules of the Supreme Court, "[a]n *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court." Sup. Ct. R. 37.1. Granting AAR and AIRCON leave to file a brief *amicus curiae* will greatly assist the Court in ruling on BN's petition. AAR and AIRCON and their members have a vital interest in the question for review presented in this case -- the available remedies for an illegal strike under the Railway Labor Act ("RLA"). Together, AAR's and AIRCON's members include most of the employers subject to the RLA, which regulates labor relations only in the railroad and airline industries. AAR's and AIRCON's brief *amicus curiae* will furnish this Court with a broader perspective than the parties can provide on the important issue addressed in the Fifth Circuit's decision, an issue which the Court has never addressed. AAR and AIRCON will provide the Court with an industry-wide viewpoint on the issue and the impact of the Fifth Circuit's decision on the day-to-day operations of the nation's airlines and railroads.

3. As explained in the brief *amicus curiae*, the Fifth Circuit's decision will have serious implications for AAR's and AIRCON's members and that decision requires Supreme Court review. The Fifth Circuit has announced a rule of law that monetary remedies are never available for a strike which violates the RLA minor disputes procedures. Absent Supreme Court review, the Fifth Circuit's ruling will undermine the effectiveness of the RLA minor dispute procedures, which, as this Court has

repeatedly recognized, are fundamental to the RLA's central purpose of avoiding interruptions to rail and air carrier operations and upon which the nation's rail and air carriers depend for peaceful dispute resolution.

4. Briefs *amicus curiae* by industry have been filed in support of petitions for certiorari in prior cases involving important issues under the RLA. *See, e.g.*, Brief of *Amicus Curiae* National Railway Labor Conference in Support of Petitioner in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989). Similarly, granting AAR and AIRCON leave to file a brief *amicus curiae* in this case will aid the Court's consideration of BN's petition for certiorari.

5. Respondents will suffer no prejudice if this Court grants AAR and AIRCON leave to file a brief *amicus curiae*.

Therefore, AAR and AIRCON respectfully request leave to file a brief *amicus curiae* in support of the Petitioner.

Respectfully submitted,

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I. INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") and Airline Industrial Relations Conference ("AIRCON") and their members have a vital interest in the question for review presented in this case -- the available remedies for an illegal strike over a minor dispute within the meaning of the Railway Labor Act ("RLA"). Together, their members include most of the employers subject to the RLA, which regulates labor relations only in the railroad and airline industries.

The AAR is an unincorporated voluntary association representing the nation's railroads. The AAR's members include all of the nation's major railroads as well as regional rail carriers. The AAR's members employ 90 percent of the nation's rail workers and account for approximately 85 percent of the line haulage and 93 percent of the freight revenues of the nation's railroads. The vast majority of rail workers employed by AAR's members are represented by unions. AIRCON also is an unincorporated voluntary association, whose membership includes every major and national scheduled commercial air carrier operating in the United States. Much of the workforce in the airline industry is also unionized.

Congress, in the RLA, determined that transportation services provided by the railroad and airline industries were so important to the nation's economy that labor disputes in these industries should be channelled into special, statutory dispute resolution mechanisms designed to minimize interruptions to carrier operations, and therefore to commerce. The Act's 'major purpose . . . was 'to provide a machinery to prevent strikes.'" *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930). The Act requires that disputes arising from disagreements over the interpretation or application of collective bargaining agreements, so-called "minor disputes," be submitted to binding and peaceful arbitration by specialized arbitration panels called adjustment boards. 45 U.S.C. §§ 152, Sixth, 153, First, 184. *See, e.g., Consolidated Rail Corp. v.*

Railway Labor Executives Association, 491 U.S. 299, 303 (1989) (hereinafter "*Conrail*").

Strikes over minor disputes are prohibited, and it is well settled that carriers have a cause of action implied from the RLA against unions for illegal strikes over minor disputes. *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957) (hereinafter "*Chicago River*"). The Supreme Court, however, has not had occasion to determine whether a carrier can obtain damages or other monetary relief under the RLA, when injured by a union's violation of the statutory duty not to strike over a minor dispute. Although the availability of damages or other monetary remedies under the RLA has not often arisen, the lower courts have generally ruled that such relief is available to persons injured by a violation of the RLA. The one notable exception is the issue presented here. In 1958, the Fifth Circuit held in *Louisville & Nashville Railroad Co. v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) (hereinafter "*Brown*"), that there was no "new statutory right of action for damages" when employees engaged in an illegal strike over a minor dispute. In *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992) (hereinafter "*BN*"), the Fifth Circuit followed *Brown* for the simple reason that there had been no intervening decisions by the Supreme Court or any other court allowing such damages. More recently, the Sixth Circuit, with one judge dissenting, reached the same result, in large part because it believed *Brown* to represent the federal common law under the RLA. *CSX Transportation, Inc., v. Marquar*, No. 91-5689 (6th Cir. Nov. 13, 1992) (hereinafter "*Marquar*").[1]

The members of AAR and AIRCON administer thousands of collective bargaining agreements with their various unions. The parties to these agreements are continually

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[1] *Amicus curiae* understand that the petitioner submitted copies of the *Marquar* decision to the Court.

involved in minor disputes over their application. In the past, railroads and airlines have relied principally upon injunctive relief to stop threatened or actual strikes over minor disputes. *Amicus curiae*, however, are very concerned that *BN* will lead to more threatened and actual strikes over minor disputes. While a carrier can seek injunctive relief, as a practical matter it may be unable to obtain such relief before its operations have been disrupted, particularly when a union strikes with little or no prior notice. That was the situation both in *BN* and *Marquar*. In each case, serious service disruptions resulted, even though the carriers moved promptly to obtain restraining orders. Indeed, the involved union appeared to pursue a calculated strategy of timing its pre-dawn strikes to ensure that the carrier could not get into court before suffering disruption to operations, knowing all the time that the dispute was a classic minor dispute and that its strikes would eventually be enjoined. An interruption of a carrier's operation, even for a few hours, can have a serious economic impact upon that carrier, as well as the shipping and travelling public. In addition, even a strike of short duration can cause shippers or travellers to switch their business from the threatened carrier to other carriers, thereby causing economic injury to the targeted carrier.

While carriers in the past usually pursued only one of the traditional judicial remedies available for such unlawful strikes, that is no longer feasible. There are significant new competitive pressures upon railroads and airlines brought about by deregulation of these industries. Congress completely removed economic regulation from airlines in the Airline Deregulation Act of 1978 and significantly deregulated railroads in the Staggers Rail Act of 1980. For example, prior to deregulation, price competition in the railroad and airline industries was severely restricted by comprehensive federal regulation. Unions benefited directly from the lack of competition. Pay and benefits were not generally a source of competition among carriers. The railroads typically reached national wage settlements. Air carriers usually bargained on a

pattern basis. Often, wage settlements would be followed by carrier applications to the relevant regulatory agency to raise prices to reflect higher labor costs.[2]

Since deregulation, carriers can no longer automatically pass increased labor costs on to consumers for their services. Price and service levels are now determined primarily by market forces. Competition has put new pressures upon the labor cost structures of airlines and railroads that developed during the regulated era. Therefore, in the deregulated era, there is more chance for disagreement between labor and management. Rail and airline unions are by definition cartels, and are among the most powerful unions in the most unionized sector of the economy.[3] Given the new competitive pressures, carriers are less able to bear financial losses from strikes or strike threats. Now, more than ever, it is important that interpretive disputes be channelled into the RLA's mandatory minor dispute resolution mechanisms.

Injunctive relief is simply not an adequate deterrent to an illegal strike. Even though the union knows it will be judicially restrained, it also realizes that it can inflict serious economic injury on a carrier with impunity, even for a brief service disruption. The availability of damages or make whole remedy is necessary to ensure that the statutory minor dispute procedures are observed and to compensate carriers for injury from an unlawful strike.

The AAR and AIRCON are also concerned that *BN* overturns the fundamental principle that the RLA imposes reciprocal duties and obligations upon unions and carriers.

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[2]In the railroad industry, this is the Interstate Commerce Commission. In the airline industry, the relevant agency was the Civil Aeronautics Board.

[3]*See generally, e.g.*, R. Posner, *Some Economics of Labor Law*, 51 U. of Chicago L. Rev. 988 (1984).

There is no principled basis to hold that only injunctive relief is available to carriers under the RLA when employees or their representatives breach those duties, while employees and their representatives also have available a broad array of compensatory remedies, including damages, make whole remedies, and monetary awards by arbitrators, when a carrier is found to have violated its statutory obligations.

II. SUMMARY OF ARGUMENT

The Fifth Circuit's decision in *BN* requires Supreme Court review, because that decision disregarded the traditional principle as set forth in long-standing precedents of this Court and recently restated in *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028, 1035 (1992)(hereinafter "*Franklin*"), that a person injured by the violation of a federal statute should be able to recover damages or other monetary relief. Although the Fifth Circuit agreed that a carrier has an implied cause of action under the RLA based on a strike over a minor dispute, it nonetheless refused to follow *Franklin*. Instead of the "common-law tradition [which] regarded the denial of a remedy as the exception rather than the rule," 112 S.Ct. at 1036, the Fifth Circuit announced a rule of law that monetary remedies are never available for a strike which violates the RLA minor disputes procedures.

The Fifth Circuit's decision also conflicts with decisions of this Court upholding broad authority in the lower courts to apply traditional judicial remedies for breaches of RLA statutory duties. In addition, the *BN* decision is contrary to the RLA, its history, and purpose. Absent Supreme Court review, *BN* will undermine the effectiveness of the RLA minor dispute procedures, which, as this Court has repeatedly recognized, are fundamental to the RLA's central purpose of avoiding interruptions to rail and air carrier operations. Moreover, the issue of whether the traditional rule reaffirmed in *Franklin* applies to the RLA is important to the effective working of a

statute designed to protect the interests, not only of carriers, unions, and employees, but also the public interest, which is adversely impacted by strikes over labor disputes in these vital industries.

For these reasons, the AAR and AIRCON respectfully urge the Court to review the issue whether carriers can recover compensatory or make whole remedies for strikes over minor disputes.

III. ARGUMENT

A. *BN* Is Contrary To *Franklin* And Other Precedents Of This Court

The *BN* decision is clearly contrary to this Court's analysis and holding in *Franklin*. In addition, the *BN* decision is contrary to the several decisions of this Court that traditional judicial remedies are available for breaches of RLA duties.

In *Franklin*, the Court observed that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." 112 S. Ct. at 1032. Once it is established that there is an implied cause of action under a federal statute, this Court restated the "long-standing rule" that "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 1033. *See also id.* at 1035. The *BN* decision involved the same kind of issue present in *Franklin* -- what are the appropriate remedies for a cause of action implied under a federal statute? There is no question, as *BN* agreed, that carriers have a cause of action implied under the RLA that strikes over minor disputes are prohibited. *See, e.g., Conrail*, 491 U.S. at 229; *Chicago River*, 353 U.S. at 30. Yet, the Fifth Circuit refused to follow *Franklin* and ignored the "general rule" reaffirmed there. Instead, *BN* merely reaffirmed its 1958

holding in *Brown* that "[w]e do not think that Congress here intended or did create a new statutory right of action for damages . . . ." 252 F.2d at 155. The Fifth Circuit improperly put the burden on the carrier to show that Congress had affirmatively authorized a damages remedy in the RLA. The Fifth Circuit thus made the same basic mistake as the lower court in *Franklin* of confusing the "analytically distinct" issue of whether there was an implied cause of action with the issue of the appropriate remedy. The Fifth Circuit's analytical approach was, of course, the very same approach soundly disapproved in *Franklin*.

The Fifth Circuit attempted to avoid *Franklin* by limiting it to the particular statute involved there, Title IX of the Education Amendments of 1972. 961 F.2d at 89 n.9. This Court made abundantly clear in *Franklin*, however, that the general rule was not limited to Title IX cases. Part II of the Court's opinion traced the general rule from its common law origins through early precedents of this Court, including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). These precedents involved not only civil rights cases, but the very first decision by this Court to hold that the RLA was enforceable through judicial remedies. 112 S. Ct. at 1033, *citing Texas & New Orleans R.R. Co. v. Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930).[4] In Part III of its opinion, the Court stated that "[w]e now address whether Congress intended to limit application of this general principle in the enforcement of Title IX," and went on to apply the general rule to the case before it.

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[4]Other referenced decisions included federal causes of actions implied under railroad safety laws, *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916), and the securities law, *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

112 S. Ct. at 1035. There was simply no principled way for *BN* to disregard *Franklin*.[5]

The *BN* decision is also contrary to other decisions of this Court, which, consistent with the traditional common law principles reaffirmed in *Franklin*, have held that courts have available all traditional remedies to enforce RLA requirements. In *Texas & New Orleans R.R. Co. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 569 (1930), the Court early on held that the RLA was enforceable through judicial remedies, even though none were specified in the statute. *See id.* at 569-70 ("The right is created and the remedy exists," citing *Marbury v. Madison*). In *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944), the Court upheld the availability of a damages remedy against a union which violated its statutory duty of fair representation, stating that "the [RLA] contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate . . . " In *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 577 (1971), the Court held that Section 2, First of the RLA was "enforceable by whatever means might be developed on a case-by-case basis." The Court quoted congressional testimony by counsel for rail unions that this was to be done "through the courts in the way in which the common law has developed in England and America." *Id.* at 577. And, *Franklin* itself held that damages were a traditional and appropriate remedy for a statutory violation under the common law. 112 S. Ct. at 1033-36.

The only decision to find any limit on appropriate judicial remedies under the RLA was *Int'l Bhd. of Electrical*

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[5]Although the majority opinion in *Marquar* did not really apply *Franklin*, even it agreed that *Franklin* controlled the issue of whether damages were available against a union for a strike over a minor dispute. The majority stated that "[s]ince the RLA contains an implied right of action, *Franklin* directs us to presume that this right can be enforced by damages in appropriate cases unless Congress has clearly spoken to the contrary." Slip op. at 41.

Workers v. Foust, 442 U.S. 42 (1979) (hereinafter "*Foust*"). While the Court found that punitive damages are not available against a union that violated its duty of fair representation, the Court reaffirmed that damages or a make whole remedy was appropriate to compensate the injured party and secure compliance with the RLA. This same reasoning equally supports a monetary remedy for a carrier injured by a union's violation of the RLA. *Cf. Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 690 (1963) ("We have held other duties imposed upon the carriers and their employees by the [RLA] binding and their breach redressable in the courts . . . .").

There is no suggestion in any decision of this Court that a damages or make whole remedy should never be available for breach of one of the most fundamental duties imposed by the RLA -- a union's duty not to strike over a minor dispute. There is also no suggestion in any decision of this Court that only employees, and not carriers, are to be compensated for breaches of statutory duties, which are binding on both parties. Thus, *BN* is clearly contrary to controlling precedents of this Court.

B. *BN* Is Contrary To The Legislative History, Purpose And Structure Of The RLA

The *BN* decision also ignored and is contrary to the legislative history, purpose and structure of the RLA. As this Court held in *Franklin*, the traditional judicial remedies are presumed available, unless Congress expressly restricted their availability. Not only does the RLA not contain any such limitation, Congress clearly intended that all traditional judicial remedies be available for breach of RLA duties.

As this Court has observed, the RLA is unique in that it was, in large part, agreed to by labor and management and then enacted by Congress. *See, e.g., Burlington Northern R.R. Co. v. Bhd. of Maintenance of Way Employes*, 481 U.S. 429, 444 (1987) (hereinafter "*BN v. BMWE*"); *Chicago & North Western*

Ry. v. United Transportation Union, 402 U.S. 570, 576 (1971). As the Act's legislative history shows, the parties deliberately did not specify all duties or remedies under the RLA. Instead, they left to the courts the task of defining those duties on a case-by-case basis. *See generally, e.g., Chicago & N.W. Ry.*, 402 U.S. at 577; *Marquar*, slip op. at 12-17. Once a statutory duty was established, it was clear that Congress intended that courts follow the traditional presumption described in *Franklin* that all appropriate remedies, both at law and equity, were available to redress a breach of that duty. The Fifth Circuit simply ignored this legislative history in *BN*, as it had more than 30 years earlier in *Brown*.

In addition, the Fifth Circuit's reasoning that compensatory remedies are never appropriate in the case of a strike in violation of the RLA's minor dispute procedures, but are available for a carrier's breach of the RLA's major dispute procedures, is not supported by the RLA. A major dispute is a disagreement arising from attempts to amend collective agreements. *See, e.g., Conrail*, 491 U.S. at 302. The Fifth Circuit attempted this forced distinction, because, in *United Industrial Workers v. Board of Trustees*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969), (hereinafter "*Galveston Wharves*"), it previously held that a make whole remedy was available to redress breach of the RLA major dispute procedures, even though the RLA did not expressly authorize such a remedy. As this Court's precedents show, however, the RLA's minor dispute procedures are as critical to achieving the RLA's central purpose of avoiding interruptions to carrier operations as are its major dispute procedures. *See, e.g., Conrail*, 491 U.S. at 299; *Bhd. of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963). Indeed, while the major dispute procedures postpone the day a union can lawfully strike, the minor dispute procedures absolutely forbid strikes.

Similarly, there is no basis in the RLA, its history or purpose, for the Fifth Circuit to conclude that a union should be able to obtain compensation for its members for a carrier's violation of a RLA statutory duty, but carriers are not to be compensated for a union's violation of its reciprocal statutory duty. By imposing reciprocal duties on carriers and unions, and by not limiting the remedies available for either party's breach of those duties, the RLA intends that monetary remedies be available, not only to employees, but also to carriers injured by a statutory breach. Certainly, nothing in the RLA restricts the availability of monetary remedies to unions and the employees they represent.

C. Supreme Court Review Is Necessary To Give Guidance To Lower Courts

Supreme Court review is also necessary to provide guidance to the lower courts on the important issue of the availability of damages or other compensatory relief for violations of the RLA.

Prior to *BN* and *Marquar*, other than *Brown*, virtually every decision concluded that all traditional judicial remedies were available to redress violations of the RLA. As previously explained *supra* at III. A. B., the decisions of this Court consistently upheld broad judicial authority to fashion compensatory remedies for violation of RLA duties.

The lower courts similarly followed the "traditional presumption" stated in *Franklin*, although not always with express acknowledgement. For example, in *Brady v. Trans World Airlines, Inc.*, 223 F. Supp. 361, 370 (D. Del. 1963), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969), the Court upheld a damage remedy against a union which caused the discharge of an employee in violation of Section 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh. Courts have also held that damages are available against carriers for

interfering with employees' rights to organize in violation of Section 2, Third and Section 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third and Fourth.[6] The District Courts are split whether punitive damages against carriers are appropriate for such a statutory violation.[7] As discussed, in *Galveston Wharves*, the Fifth Circuit held that a union could obtain a make whole remedy on behalf of its members against a carrier which violated the status quo requirement in Section 6 of the RLA, 45 U.S.C. § 156. In *United Transportation Union v. Florida East Coast Ry.*, 586 F.2d 520 (5th Cir. 1978), the Fifth Circuit suggested that compensatory damages may be available for a status quo violation. A district court held in *Denver & R.G.W. R.R. v. Bhd. of R.R. Trainmen*, 58 L.R.R.M. (BNA) 2568 (D. Colo. 1965), *rev'd on other grounds*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967), that damages were available against a union for an unlawful strike over a minor dispute.[8]

The *Brown* decision, as reaffirmed by *BN*, is a dramatic departure from the development of remedies under the RLA up to this point and has gotten the lower courts off track on available remedies. The *Brown* decision clearly influenced the majority in *Marquar*, which elevated *Brown*, as reaffirmed by *BN*, as the definitive authority on what common law remedies are available for a strike over a minor dispute. *See, e.g., Marquar*, slip op. at 44-45. Even though the majority opinion purported

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[6]*See, e.g., Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1033-34 (9th Cir. 1970).

[7]*Compare, e.g., Belton v. Air Atlanta, Inc.*, 647 F. Supp. 28, 31-32 (N.D. Ga. 1986); *Brown v. World Airways, Inc.*, 539 F. Supp. 179, 181 (S.D.N.Y. 1982), which held punitive damages were available, with *Maas v. Frontier Airlines, Inc.*, 676 F. Supp. 224 (D. Colo. 1987); *Brotherhood of Ry. Carmen v. Delpro Co.*, 579 F. Supp. 1332, 1335-36 (D. Del. 1984), which held they were not.

[8]Although not involving a minor dispute, *National Airlines, Inc., v. Airline Pilots Ass'n*, 431 F. Supp. 53 (S.D. Fla. 1976), relied on *Brown* to hold that damages were unavailable for breach of the duty to bargain in good faith.

to apply *Franklin*, its per se rule that damages are never available to a carrier for such a violation was clearly contrary to *Franklin* and the RLA, which contain no such limitation on remedies.

Like *BN*, the *Marquar* majority transgressed *Franklin* by putting the burden on the carrier to show that the RLA affirmatively authorized a damages remedy. For example, the majority reasoned that, because no "published opinion" had held a carrier could obtain damages against a union, "a party requesting such a change should be required to demonstrate why the remedies that have been appropriate for 66 years are no longer good enough." *Id.* at 45-46. However, as *Franklin* demonstrated, the presumption is that a damages remedy is available unless Congress has affirmatively limited its availability. The relevant inquiry is not whether the parties have sought a particular remedy in the past or even whether another court has authorized that remedy under the statute. The correct inquiry is whether Congress has precluded that remedy. In *Marquar*, the majority fully agreed with the dissent that the RLA contained no limitation on remedies under the RLA. *Id.* at 41. Moreover, the only RLA "common law" cited by the majority opinion for its conclusion that a carrier may never recover damages from a union for a strike over a minor dispute was *Brown*. *Id.* at 46. But *Brown* is demonstrably contrary to *Franklin*!

The majority defended its construction of *Franklin* by stating that *Franklin* allows a court to determine whether a remedy is "appropriate." *Id.* at 42. However, this Court, by use of the word "appropriate," merely referred to the traditional remedies for an injury and held that damages were an appropriate remedy for the implied cause of action involved there. The Court relied upon the traditional presumption that where the statutory violation "results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is

implied, according to a doctrine of the common law . . . ." 112 S. Ct. at 1033, quoting *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916). This Court surely did not intend, through use of the single word "appropriate," that a court could impose its own judicial philosophies regarding which classes of persons should receive monetary compensation for statutory injuries, labor relations policies, and the "balance of power" between labor and management under the RLA, and proceed to create wholesale limitations not found in the statute on available remedies. Such considerations are the province of the legislature. Yet, that is exactly what the Sixth and Fifth Circuits have done, by holding carriers can never recover damages from unions for minor dispute strikes.

Furthermore, Congress already determined the "balance between labor and management" in minor disputes by providing in the RLA that unions cannot settle minor disputes through the exercise of their economic power, as they tried here. *See, e.g., Bhd. of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33, 40 (1963) (Congress did not intend "to permit the settlement of minor disputes through the interplay of economic force . . ."); *Chicago River*, 353 U.S. at 34. Instead of economic warfare, Congress required that minor disputes be resolved by a neutral arbitrator. For these same reasons, the *Marquar* majority's worry that a damages remedy could be used as a club by management against unions is totally misplaced.

The Sixth Circuit's concern that, if a union "guessed wrong" whether a dispute was major or minor, it would be liable for damages that could impair its effectiveness as a union is also totally contrary to the RLA minor dispute procedures and this Court's precedents holding those procedures mandatory. Unions have no protected right to "guess" whether a dispute is minor. The minor dispute procedures are not optional. Moreover, as this Court explained in *Conrail*, when there is doubt whether a dispute is major or minor, the Act prefers a minor dispute classification in order to channel the dispute into

a peaceful dispute resolution mechanism. 491 U.S. at 310-11. ("Full utilization of the [Adjustment] Board's procedures will ensure that the risks of self-help are not needlessly undertaken and will aid '[t]he peaceable settlement of labor controversies'.").

A union's natural proclivity will be to "guess" that a dispute is major, so the union can use its considerable coercive economic weapons, *i.e.*, strikes, to settle the dispute. The availability of a damages remedy will help deter unions from "guessing" whether a dispute is major or minor and ensure that "the risks of self-help are not needlessly undertaken." Furthermore, the unions have a full remedy in arbitration. Or, if they believe that the carrier has unilaterally changed a collective agreement, so as to give rise to a major rather than a minor dispute, they can seek judicial relief, as they frequently do, including in *Conrail*. Conversely, by shielding a union from the economic consequences of a "bad guess," the lower courts' decisions will encourage strikes over minor disputes. The lower courts' analysis here also ignores the public interest in avoiding interruptions to the operations of rail and air carriers from labor disputes. *See, e.g., Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284, 290 (1963) ("[t]he federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."); *accord Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 552 (1937).

The *Marquar* majority's reliance upon this Court's decisions in *Foust* and *BN v. BMWE* was also misplaced. As previously explained, *Foust* only held that punitive damages are unavailable; it actually supports the position that compensatory damages are available to carriers when a union engages in an illegal strike. In *BN v. BMWE*, the Court was concerned with what restrictions the RLA imposed upon unions after the RLA's major dispute resolution procedures had been exhausted and the parties were free to engage in self-help. The Court was being asked to find an implied cause of action against secondary

picketing in that situation. In contrast, there is no question that a strike over a minor dispute gives rise to a cause of action under the RLA. The only question here is the appropriate remedy, an issue not present in *BN v. BMWE*. Furthermore, in *BN v. BMWE*, this Court refused to find a limitation (against secondary picketing) not contained in the RLA. Yet that was precisely what the Fifth, and now the Sixth, Circuits have done -- created a limitation (against compensatory remedies) Congress has never adopted.

Finally, both *BN* and the majority in *Marquar* made too much of the fact that the issue of a carrier recovering damages from a union has arisen "after 66 years." *Marquar*, slip op. at 46. The case law under the RLA has historically developed as the parties brought issues to the courts. The damages issue, as well as other important issues of first impression under the RLA, has arisen now, "after 66 years," in large part due to pressures resulting from deregulation. For example, the issue of management's prerogative to sell all of its rail lines did not come to the Court until *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives Association*, 491 U.S. 490 (1989), 63 years after enactment of the RLA. This Court there noted that line sales were encouraged by Congress' partial deregulation of railroads. *Id.* at 510-11. This Court did not address whether secondary picketing violated the RLA until 1987 in *BN v. BMWE*. In that case, the carrier target of the secondary picketing had broken from the national pattern of railroad labor agreements, because of competitive forces brought on, in part, by deregulation. Even though the major rail carriers had historically bargained as a national group for more than 40 years, the courts also had no problem ruling that a carrier could withdraw from that type of bargaining. *See, e.g., United Transportation Union v. Grand Trunk Western R.R.*, 901 F.2d 489 (6th Cir.), *cert. denied*, 111 S. Ct. 55 (1990). Again, carriers withdrawing from national multi-employer bargaining did so because of competitive pressures brought on by deregulation. This Court did not address until 1989 the issue whether a carrier violated the RLA by refusing

to displace junior employees who crossed a picket line with more senior, full-term strikers who sought to return to work at the strike's conclusion. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989). Before airline deregulation, airlines typically did not try to operate during a strike, and issues regarding replacement workers and cross-overs, therefore, did not arise.[9] In each of these cases, the passage of time did not foreclose judicial treatment of these issues or dictate their outcome. Nor should it have been a factor in *BN* or *Marquar*.

IV. CONCLUSION

Given the importance of the issue of whether damages or other compensatory remedies are available to carriers when a union strikes over a minor dispute to the railroad and airline industries and to the proper administration of the RLA, the Court should hear the issue now.

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[9]The Airline Deregulation Act did away with the mutual aid pact, under which flying airlines shared revenues with struck carriers.